No. 3862

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ELLIOTT-O'BRIEN COMPANY, a Corporation, Bankrupt.

S. G. CLIMENSON, as Trustee of ELLIOTT-O'BRIEN COMPANY, a Corporation, Bankrupt.

Appellant

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Corporation; COFFMAN. DOBSON Bank & TRUST COMPANY, a Corporation; BEE NUGGETT PUBLISHING COMPANY, a Corporation.

Appellees.

BRIEF OF APPELLEE

COFFMAN-DOBSON BANK & TRUST CO.

A. A. HULL and J. E. MURRAY,
Attorneys for Appellee

Coffman-Dobson Bank Building,
Chehalis, Washington.

F. H. Cole Printing Co.

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STATEMENT OF THE CASE

Following the rules of this court we do not set forth a statement of the case, as that of the appellant is substantially correct. (Apps. Brief pps. 3-7 inc.)

ARGUMENT

The appellant presents to this court for its consideration two questions, namely;

1st. Does the evidence show that appellants had "reasonable cause to believe" that the bankrupt was insolvent at the time the payments were made effcting a preference as required by the Bankruptcy Act?

2nd. Are preferences void under the law of the state of Washington regardless of whether or not creditors have "reasonable cause to believe" that the debtor is insolvent?

We take it under the rule announced in

Stellwagon v. Clum, 245 U. S. 605 41 A. B. R., 1

and generally recognized, that an appellate court will not disturb the conclusions of the Referee on questions of fact where there is no conflict in the testimony, is applicable to the question involved as to whether or not this appellee had reasonable cause to believe that payments made to it by the bankrupt might effect a preference. The referee found that this appellee, which which will be hereinafter referred to as the bank, did not have such"reasnoable cause to believe" and that a preference was therefore not effected within the meaning of the Bankruptcy

Act, and the referee applied the same reasoning to the application of the so-called trust fund theory under the state law. Hence it is clear that on a conflict in the testimony conclusions of the Referee which were readily affirmed by the District Court will be adopted by this court on the question of the bank having a reasonable couse to believe a preference was being or might be effected by the receipt of payments from the bankrupt.

On page 15 of appellant's brief the appellant attempts to argue that the bank and the other appellee not only had reasonable cause to believe that the debtor was insolvent, but that they actually knew it. This bald statment is decidely not borne out by the record, and at the expense of being guilty of some repetition, we desire to submit here a resume of the outstanding points shown by the testimony in this case, which is as follows:

RESUME' OF THE EVIDENCE

For a long time prior to bankruptcy the bank had advanced money in the usual course of business to the bankrupt on its notes. These notes on January 1, 1921, were changed from demand or one day notes to notes maturing three months hence; that is to say on April 1, 1921, and these notes aggregated $5500.00

(R.108-112), After January 1, 1921, the bank made further advances, which were later repaid. (R. 77). Evidently the bank changed the demand or one day notes to three month notes with the idea that the proposed reduction of assets of the appellant by way of sales and general liquidation called for a definite final payment of the obligation which had been carried for years(R.113) and on April 1 a regular notice of the maturity of the notes was sent out to the bankrupt, and Mr. Elliott came in and it was then agreed that he would pay the notes at the rate of $1,000.00 per week and no exension was asked for. (R. 113). All merchants were rapidly reducing inventories during the early part of 1921 (R. 43) and naturally the bank wanted its debt reduced as the inventory shrank. The reductions of inventories were very rapid (R. 43) and, therefore, the bank might reasonably expect its debt to be rapidly reduced. When Elliott came in as aforesaid, he was informed that the bankrupt was paying other concerns and taking discounts and that the bank expected the same treatment on its obligations, which had then matured. (R. 64) The proposition to pay $1000.00 per week looked easy and was lenient. (R. 65-75-76). The bank did not take a determined stand on this matter. (R.79)

December 31, 1920 the bankrupt gave the bank a statement showing the condition of its business on

that date. (R. 107-115). This statement showed a net worth of $14,230.35 after charging off depreciation and bad accounts. Thereafter from time to time the bank discussed with Elliott, the manager of the bankrupt, the condition of the business and no material changed was disclosed, a margin of surplus over debts always appearing. (R. 107)

The bank knew of no financial difficulty of the bankrupt until May 3rd, 1921, when some checks bearing the bankrupt's endorsement came from another bank, (the bankrupt having always done business theretofore with the appellee bank) and this put them on inquiry. They went to their attorney, who investigated and found that the bankrupt was negotiating through the Seattle Merchants' Association for some solution of its problem. (R. 107). It had desired to sell out, but it then had no officers capable of effecting a transfer and a receivership was suggested in order to effect this. (R. 100) Upon learning of the probable embarrassment of the bankrupt the bank charged the balance in its deposit against the notes and this is the credit of $143.08 on May 4, 1921. (R. 99-111) Up to this time the bankrupt had been carrying a balance in their account with the bank in practically the same amount as it had for years (R. 108-110) and when it suddenly

ceased doing business with the bank it put the bank on inquiry. (R. 110)

It is well to note that up to May 2nd, Mr. LeSourd, who represented the majority of the capital stock of the bankrupt, did not know that the bankrupt was insolvent. (R. 41) Elliott, the manager up to April 26th, when he left did not consider the business insolvent. ((R. 69-104-105) nor did Hart, his successor think anything but that the business would at least pay its debts, even if the stockholders got nothing. (R. 91-92-93) As late as April 14th Hart thought, the capital stock had value and talked of buying it. (R. 92)

It should be borne in mind that the bank was liquidating obligations due it, as all banks were at that time, (R. 113) and that that time meant a period which is aptly described by the Honorable District Judge in his Memorandum Decision to the effect that, "During a period of drastic deflation, following a period of extraordinary inflation, when the judgment and calculation of business men are liable to be unsettled and to want in fullness of vision and a complete grasp of the relative worth of the various items entering into the value of a going merchandise business the knowledge and notice of insolvency should be shown with much greater clearness than it could be

contended was done in the present case." (R. 28)

If a new line of credit was necessary after the company had paid up its obligations to the bank it manifestly would be on the basis of the company's standing and needs at the time it was asked for. (R. 113-114) An examination of the bank's ledger for April, 1921, shows daily balances of substantial amounts and large daily deposits, with only one over draft, and the balances gradually increasing in size toward the end of the month. (R. 110-111-112) The vice of appellant's argument lies in its failure to account for a disposition of the large surplus in the business through sales and otherwise and the acceptance of such surplus or a portion thereof by a creditor, as under such circumstances a creditor would not be held to notice of any condition of insolvency. The notice the bank had was to the contrary namely: of the bankrupts' solvency, a fact quite evident from the forced sale of the assets for $11,000.00 (R. 21) which sale the purchaser considered a good one for him (R. 84)

About February 18, 1921, one stockholder wanted to sell her stock for 50 cents on the dollar, (R. 117) indicating that she thought the business could pay its debts and leave at least 50 per cent for stockholders on their investment. The cause of the sales

and general liquidation was not the insolvency of the business but the decision of the majority of stockholders to close out. (R. 117-119--120-123-125--126) Mr. LeSourd, representing the majority of the stock employed D. G. Abel, an attorney, to adjust demands of the O'Briens against Elliott. (R. 130 to 134)

It is interesting to note that on April 23, 1921, Mr. LeSourd did not know whether the assets exceeded the liabilities. (R. 149-150) As indicating that the bank had no worry about the Elliott-O'Brien Company, when Mr. LeSourd talked to the vice president of the bank he found a man who knew very little of the bankrupt's affairs. (R. 36) Certainly if the bank was afraid of the bankrupt's condition, its officers would have had knowledge of the matter.

Again referring to Mr. LeSourd, it seems that he would not sell the business at 90 cents on the dollar, which amount would have paid the debts and left something for stockholders. (R. 39-75) He thought the capital stock had a value as late as April 22nd and he offered the stock at 50 cents on the dollar on December 31, 1920. (R. 40) Indeed it was not until May 2nd that Mr. LeSourd and Mr. Hart or anyone else knew that the store was insolvent. (R. 41-43) How could the bank have known it sooner?

It should be borne in mind that no creditor was threatening to enforce collection of any debt (R. 44) and up to May 2nd the owners of the business expected it to continue. (R. 44) The reductions by sales etc. were occasioned by a desire of the O'Briens to reduce their capital stock holdings to cash. (R. 44) Mr. Elliott wanted to buy the business and pay 50 per cent for the capital stock. (R. 46) Manifestly Elliott did not think the company was insolvent.

The source of the bank's knowledge was from Elliott, who had been manager of the store for several years and in sole charge, and he left when the O'Briens obtained control of all the stock and decided to sell regardless of Elliott's desires. (R. 50)

Some stress was laid by the appellant on so-called overdrafts of the bankrupt in its account at the bank but these overdrafts did not appear on the bank's books and the bank knew nothing of them(R.53) and as late as November 1920, the bankrupt discounted most of the bills. (R. 58) Up to January 1, 1921, no debt was past due except the account of Carson, Pirie Scott. (R. 71) The same condition prevailed in January and February; (R 71) In March two more accounts became past due, (R. 72) one of which was the Western Dry Goods account, whose representative investigated and became satisfied with the

condition of the bankrupt early in April. (R. 72-73)

The stock of merchandise was in perfect condition April 1, 1921. (R. 76-83) and Elliott was of the opinion that the stock of merchandise should bring 100 cents on the dollar. (R. 75)

Elliott did not tell the bank of his intention to leave until April 20th, according to his testimony; (R 78-79) and then Hart told the bank that the business would continue as it had, (R. 87-91-93) but that they would have to slash prices to the extent that they probably would be able to pay the debts and not leave anything for the stockholders. (R. 87-91-92) and up to the time of the appointment of the reciver in the State Court Hart was of the same opinion. (R. 92) Touching the question of notice to the bank, the appellant makes reference to statements made between LeSourd and Hart by correspondence and otherwise, but these were not brought to the attention of the bank and it did not know of them, and in any event the testimony of these parties when in court under oath disclosed that their main idea was not whether the concern would pay out, but whether it could do so quickly, their interest then being to realize on the capital stock investment of the O'Briens.

It is interesting to note also just what preference

it is claimed the bank and Carson, Pirie Scott Company obtained. Carson, Pirie Scott Company and the bank were easily the largest creditors and it is but a natural thing that they should have obtained most of the money. By a simple computation, taking the figures on the Trustee's Exhibit "I" (R. 157) it is apparent that the assets having been disposed of at $11,000.00 would pay abou 73 per cent dividends on the claims filed, whereas if the alleged preferences are returned to the estate, the claims of the two appellees will be proportionately increased so that the dividends then paid will not much exceed 88%, an alleged preference in round numbers of approximately 15%, and a preference which is not one which indicates that either of the appellees was trying to get substantially more than other creditors and not indicative of any attempt on their part to gut the bankrupt concern. The amount received by the two appellees appears large only when you do not consider that their claims were large.

ARGUMENT CONTINUED

From the foregoing resume of the testimony it is clear that the bank had no knowledge of any embarrassment of the bankrupt concern at any time until May 2nd or May 3rd, and indeed it is questionable

whether the company was insolvent at all, or in any event insolvent prior to the 1st of May. And it is clear too that the bank was merely liquidating outstanding obligations, and especially with a concern which was rapidly reducing its stock of merchandise with the intention of paying its debts.

Hence we argue that the cases cited by the appellant touching the matter of "reasonable cause to believe" are in point only when facts exist from which reasonable cause to believe can be inferred, and where the testimony is conflicting and the Referee has found that reasonable cause did not exist, no appellate court should disturb such findings of the Referee.

However, if the Referee had made no findings on the question, we apprehend that this court could reach no other conclusion than that the bank was acting in the utmost good faith in the ordinary course of business and that it was taking payment of notes past due in the customary way, with no circumstance to put it on inquiry.

In the case of

Healey v. Wehrung, 229 Fed., 686, 36 A. B. R. 673

decided in this court, the court was dealing with a state of facts so entirely different from those in the case at bar, that it is hardly in point in this case.

With the general proposition found in so many case, that if insolvency is known to exist or if the creditor has reasonable cause to believe that it did exist he will be presumed to have reasonable cause to believe that a transfer to him would effect a preference we have no quarrel, but merely say that the facts brought out in this case did not bring it within the rule of the cases referred to.

In this connection it should be borne in mind that under the Bankruptcy Act insolvency is not inability to pay debts, but it is where "The aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

Bankruptcy Act, Sec. 1

Therefore, the appellant should prove that the bank had knowledge or reasonable cause to believe that the bankrupt was insolvent under the Bankruptcy Act

in order to effect an avoidance of the payments complained of, and certainly the evidence falls considerably short of proving any such knowledge or reasonable cause to believe. As to the question of whether the bank had notice of insolvency under the state law, we will touch later on.

Another question arises and that is whether it appears satisfactorily from the testimony that the bankrupt was insolvent under the Bankruptcy Act, or under the State Law at any particular time prior to May 2nd. It is not clear to us from the testimony that bankruptcy existed at any time prior to May2nd. if indeed it existed at that time. The assets seem to have exceeded the liabilities and brought a very substantial amount at a forced sale, and that all the parties expected that the debts could be paid by reducing the assets to cash, the thing that was prevented by receivership in the State Court, hastened by the actions of representatives of the majority of the capital stock in insisting that the assets be reduced to cash not for the purpose of ultimately paying the debts, but of realizing on the stock investment.

RIGHT OF SET-OFF BY BANK

The right of a bank to set-off against matured ob-

ligations, due it from a customer, the customer's deposit in the bank's hands, cannot be seriously questioned.

> 2 *Collier on Bankruptcy* (12 Ed.) 1095 *et seq. Dunlop v. Seattle Nat'l Bank*, 93 Wash., 568. 161 Pac., 364. 38 Am. B. R. 937

Nor was this right questioned in this proceeding in so far as the application by the bank of the $143.08 balance on May 1, 1921 was concerned.

The record shows balances in various amounts during April 1921, which was the month in which the bank received the payments complained of. (R. 110-111) The bank could have at any day or on several days during the month of April applied the balances in its hands on the bankrupt's notes to it. Had the bank done so it would have been paid in full. By taking checks from the bankrupt periodically during April, thereby effecting the payments complained of by the appellant, the bank got no more than it could have obtained had it set-off directly from the depositor's account, amounts equivalent to the amounts for which it received checks.

The method of set-off is not material, whether it

be by check or by direct application of the depositor's balance.

Studley v. Boylston Nat'l Bank, 29 Am. B. R. 649. 200 Fed., 249.

Wilson v. Citizens Trust Co., 37 Am. B. R. 86, 233 Fed., 697.

True the bank's right to set-off might be affected by collusion between it and the bankrupt, as, for instance, in building up a balance for the purpose of set-off.

2 *Collier on Bankruptcy* (12 Ed.) 1095 n. 37. *In re Scherzer,* 130 Fed. 631. 12 Am. B. R. 451.

But in this case it is clear that no such collusion existed. If collusion had existed the bank would not appear in this proceeding as a claimant,—it would have been paid in full and gone the way of those creditors referred to by the trustee in his testimony. (R. 104.

It seems that the bank's right of set-off is a more ancient rule of law than any "trust fund theory."

2 *Collier on Bankruptcy,* (12Ed.) 1095

and does not seem to be in conflict with the so-called "trust fund theory."

We urge that a bank loans money frequently on condition that the borrower carry his deposit account with the loaning bank, and such a deposit with the legal right of set-off becomes in part the security of the bank for the loan. The law does not require a corporation to change its depository when it suspects that it does or may face insolvenccy and the bank may apply the security given to it, namely, the deposit account, to the payment of obligations due it without violating any rule of law prohibiting preferences. If a bank may do this once it may do it twice or any number of times, or it may for convenience take the check to itself instead of directly applying the balance; thereby it will accomplish the same result. Therefore, it seems that in a very real sense a bank is a secured creditor (the measure of itse security be ing the deposit at any one or various times) and the applying of the security it holds to the payment of debts due it is not a preference, for it gives full value for the amount taken, namely a credit for the full amount applied.

14 *a C. J.* 899

Klosterman v. Mason Co. Central R. R.

8 Wash., 281, 36 Pac., 136.

The right of a bank to set-off is often referred to as a lien. While this definition may be incorrect
7*C. J.* 765
in principle it is correct for the practical effect is the same.

3 *R. C. L.,* 217

TRUST FUND THEORY

The "trust fund theory" is in substance this:

> *"The assets of an insolvent corporation constitute a trust fund for the payment of its debts in which all of its creditors are entitled to share ratably."*

Nelson v. Svea Pub. Co., 178 *Fed.* 136

The Supreme Court of the State of Washington has announced its adherence to the "trust fund theory" and has applied it in the following cases, namely:

Thompson v. Huron Lbr. Co., 4 *Wash.,* 600
30 Pac., 741., 31 Pac. 25.,

Conover v. Hull, 10 Wash., 673, 39 Pac., 166
45 Am. St. R. 810

Tacoma Ledger Co. v. Western Home Bldg., Assn., 37 Wash., 467, 79 Pac. 992.

Jones v. Hoquiam Lbr. & Shgl. Co., 98 Wash. 172, 167 Pac., 117

Benner v. Scandinavian Bank, 73 Wash., 488, 131 Pac. 1149, Ann. Cas., 1914 D, 702

Williams v. Davidson, 104 Wash., 315, 176 Pac., 334

In all of the cases decided by the Supreme Court of the State of Washington, wherein the "trust fund theory" is applied it is clear from the record in those cases that the preferred creditor had knowledge or should have had knowledge of the insolvent condition of the bankrupt at the time of receiving the preferences.

In many states which adhere to the so-called trust fund theory" an exception is recognized in the right of a corporation to prefer creditors though insolvent where the corporation is a "going concern" at the time of the preference, doing business in the ordinary way, if such preferences are made in good faith.

> *"An exception to the rule denying the right to prefer creditors is recognized in some jurisdiction's in cases where the corporation although insolvent, is a "going concern" at*

> *the time of the preference, doing business in the ordinary way, and under such circumstances preferences to particular creditors are sustained, if made in good faith.*"
> *Sec.* 3076, 14 *a. C. J.*, 899

The exception above noted does not do violence to the "trust fund theory", but on the contrary gives it a reasonable interpretation and is not inconsistent with the decisions of the Supreme Court of the state of Washington wherein the "trust fund theory" is announced or applied.

In the case of *Thompson v. Huron Lbr. Co.,* 4 Wash., 600, the facts are clearly those which indicate that the preferred creditor possessed a knowledge of the insolvent condition of the corporation and hence could not have been acting in good faith. The case of *Thompson cv. Huron Lbr. Co.,* just cited, was limited in its application in the case of *Brooks v. Skookum Lbr. Co.,* 9 Wash., 80, where the court said:

> "There was no attempt in the case of *Thompson v. Huron Lbr. Co.* to lay down the rule that a corporation conducting a profitable business will be adjudged insolvent simply because at some particular time its assets did not equal the amount of its liabilities. *What was said in that case was confined to corporations having practically stopped business or reached the point where*

> *the corporate business could no longer be sucessfully prosecuted."* (Italics ours)

See also 14 *a. C. J.* 899, *Sec.* 3076.

The case of *Brooks v. Skookum Lbr. Co.,* aforesaid 9 Wash., 80 has never been overruled or distinguished by the Supreme Court of the state of Washington and its authority is unquestioned. Its application to the case at bar is clear.

For an excellent discussion of the "trust fund theory" and of what constitutes insolvency, see *Harle-Has Drug Co., v. Rogers Drug Co.,* 113 Pac. 791 (Wyo.)

Appellant cites the case of *In Re McDonald Sons,* 178 Fed., 487 (B. 47) This case is one based on facts essentially different from those in this case and insolvency clearly appeared.

The case of *Stellwagen v. Clum,* 245 U. S., 605, 41 *Am. B. R.* 1.

is based on positive statute law of the state of Ohio, giving a receiver or trustee title to property transferred in violation of that law, and even under such conditions insolvency must appear.

The case of *Grandison v. Robertson,* 231 *Fed.* 785.

cited by appellant is likewise a case dealing with statutory law of New York, giving a trustee a right of action, but even under such a case insolvency and the giving of the preference with the intent to create one are required. Likewise *Cordozo v. Brooklyn Trust Co.,* 228Fd., 333, cited by appellant, deals with the New York statute and all of the New York cases cited by appellant which we have examined are based upon this statute. There is no such statute in the state of Washingon.

INSOLVENCY

Insolvency has been variously defined, usually with reference to the particular matter under consideration when the definition was made. It has been said that insolvency is inability to pay debts, but we believe the real test of insolvency is general inability to pay its debts in the due course of business and not mere inability to pay one or a few of its debts, for if the latter were true practically every corporation would be insolvent during most of its career, but general inability to pay its debts, means an inability to pay practically all of its debts, which discloses a hopeless situation. It is idle to say that a corporation that cannot pay one of its debts at the time it comes due is immediately insolvent and that any

creditor receiving any money from it is receiving a preference. Business in this country would cease to function if this were the case, or it would have to be done on a cash basis.

We do not think that any definition cited by the appellant goes to the extent of holding that the mere inability to pay a debt or a few debs in due course of business as they mature is the final test of insolvency. Such might be insolvency if other conditions were present such as the cessation of business.

The testimony in this case is that the concern had been discounting its bills as late as November and as late as in March only three accounts were past due. The business was a going concern, was doing its regular banking business as it had for years and was paying many of its debts and intended to remain open.

On pages 67 and 68 of appellant's brief appears the following:

> *"Applying the test of insolvency to the bank it likewise knew from its own account as well as from the condition of the bankrupt's business that it could not pay its bills in due course of business and therefore knew that the bankrupt was insolvent."*

The record will not bear out this statement, as

knowledge gleaned from the bank account showed that its condition was the same as it had been for years and it was evident to the bank that other creditors were being paid, and taken with all the other testimony hereinbefore referred to, it is clear that the bank had no suspicion of the insolvency of the bankrupt, if indeed, as we have before stated, it was insolvent at all.

Regina Music Box Co., v. Otto N *Sons,* 56 *Atl.,* 715 (N. J.)

See pages 718 et seq., which contains a clear discussion of the elements of insolvency and what constitutes proof thereof.

See also

Shaw v. Gilbert, 86 N. W.., 188-191 (Wis.) which says "*Embarrassment accompanied by extension and other expedients is not unusual with manufacturing concerns having abundant assets.*"

REQUISITES OF PROOF

We contend that it was necessary for the Trustee to prove in order to set aside the alleged preference

that on the date of the receipt of each payment, by the bank—

1st. That the bankrupt was insolvent.

2nd. That each payment at the time it was received operated to give the bank a greater percentage than other creditors then received.

3rd. Did the bank at the time of receiving each payment know or have reasonable cause to believe that it was receiving a preference?

It does not appear from the record that the trustee has established these facts. It is conceivable that a particular payment would be preferential, whereas another would not be, and we submit that the Trustee has not sustained the burden placed upon him by the law.

See appellee Carson, Pirie Scott Co.'s brief on this subject.

THE TRUSTEE'S REMEDY

We take it that under the *Bankruptcy Act, Sections 57-g, 60-b and 67-e,* the remedy of the Trustee in the case of alleged preferences would be either to bring

a suit for the recovery of the alleged preference or as was done in this case, object to the allowance of the bank's claim until it had repaid the preference, or until the other creditors had received the same proportion that the bank had. Having chosen the latter course the trustee is limited to the establishment, if he can, of a preference under the *Bankruptcy Act,* provided in *Section* 57-*g* of that *Act.*

> *Western Tie & Timber Co., v. Brown* 196 *U. S.* 502.

We contend that the trustee is therefore unable to apply the contention that there has been a prefer- under the socalled "trust fund theory" in a proceeding for the disallowance of the claim of the bank and is limited to the application of the law prohibiting preference within the four months period under the *Bankruptcy Act.*

> *Appellee Carson, Pirie & Scott Company's brief herein.*

CONCLUSION

This case has been carefully considered by the Referee and by the District Judge, both of whom

have arrived at the same conclusion after due deliberation, and we think their conclusion is not only equitable, but legally sound. We believe that the facts in the case and the law applicable thereto entitle the bank to retain the moneys paid to it as having been received in the utmost good faith in the ordinary course of business and without any knowledge or reasonable cause to believe on the part of the bank that the Elliott-O'Brien Co. was insolvent or even in danger of insolvency, and that the payments were received under the belief that the Elliott-O'Brien Co. was going to continue in business and would be able to pay all of its debts, and that neither the "trust fund theory" has been violated by receiving such payments, nor has the bankruptcy law applicable to preferences been violated.

We, therefore, conclude in saying that the order of the Referee and of the District Judge are entitled to the affirmance of this court.

At the hearing before the Referee and likewise on review before the District Judge in order to save a duplication arguments and briefs, etc., it was agreed that the arguments and briefs submitted by Carson, Pirie Scott Co., and by the bank would be applicable to the cases of the other in so far as per-

tinent and we, therefore,ask that in so far as applicable, the brief and argument of Carson, Pirie Scott Co. on this appeal be considered in connection with the brief on behalf of the bank.

Respectfully submitted,

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